Supreme Court, U. S.
FILED
FEB 9 1979
MICHAEL RODAK, JR., CLERK

Nos. 78-911 and 78-1036

In The

Supreme Court of the United States

October Term, 1978

INDUSTRIAL UNION DEPARTMENT, AFL-CIO,
Petitioner,

v.

AMERICAN PETROLEUM INSTITUTE, et al.,
Respondents.

RAY MARSHALL, SECRETARY OF LABOR,
Petitioner,

v.

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF INDUSTRIAL UNION DEPARTMENT, AFL-CIO IN SUPPORT OF PETITION FOR CERTIORARI

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I

The joint memorandum in opposition filed by the American Petroleum Institute, et al.[1] embraces only the result reached by the court below, and rejects the rest of the decision, at least so long as there is a chance to avoid review of that decision by this Court.

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[1] Joint Memorandum in Opposition for Respondents the American Petroleum Institute, et al., the Rubber Manufacturers Association, et al., the Chemical Specialties Manufacturers Association, E. I. duPont de Nemours & Co., and the Independent Petroleum Association of America, filed January 26, 1979. The parties filing the joint memorandum are hereinafter referred to as "API", and the memorandum as "API Opp."

The court below stated the basis of its decision as follows:

> OSHA's failure to provide an estimate of expected benefits for reducing the permissible exposure limit, supported by substantial evidence, makes it impossible to assess the reasonableness of the relationship between expected costs and benefits. This failure means that the required support is lacking to show reasonable necessity for the standard promulgated. Consequently, the reduction of the permissible exposure limit from 10 ppm to 1 ppm and all other parts of the standard geared to the 1 ppm level must be set aside. [App. 21a-22a]

That court was "not persuaded by OSHA's argument that this standard should be upheld since the lack of knowledge concerning the effects of exposure to benzene at low levels makes an estimate of benefits expected from reducing the permissible exposure level impossible." App. 19a. Instead, the court held that OSHA must stay its hand "[u]ntil such estimates are possible. . . ." App. 21a.

And, recognizing that its ruling conflicts with the decisions of other circuits upholding OSHA standards, the court did "not attempt to reconcile" its decision with the prior cases. App. 21a.

Because acknowledging what the Court below said and did leads inevitably to the conclusion that the question presented in the petition is substantial and that the courts of appeals are in conflict on the correct answer—conclusions that would defeat API's purpose—the API memorandum in opposition recites at length what it asserts is the evidence that "prompted" the Fifth Circuit's decision. (API Opp. 4, 5-15). Yet, the court of appeals neither relied upon nor even discussed any such supposed evidence. And for good reason: API's version of the "evidence" bears little resemblance to the testimony and exhibits which comprise the record of this case,[2] or to the findings the Secretary of Labor made on that record.

[2] The original record has been transferred to this Court from the court of appeals. References in this brief to the transcript of the rulemaking hearings conducted by the Secretary will be to "Tr." References to the exhibits submitted in the rulemaking proceedings will be to "Ex.", with the exhibits numbered in the form set out in the Secretary's certification of the record to the court of appeals.

Having made its own findings of fact, API then draws its own conclusion of law, contending that the court of appeals decided a "question never raised (and therefore never decided) in previous occupational health standard cases—namely, how [the Secretary] should regulate a substance showing minimal (if any) risks below the existing standard where there is a record basis for an imprecise, but useful, estimate of the benefits of reducing the PEL." API Opp. 19. But the Fifth Circuit's opinion makes it plain that the court did *not* rest its decision upon findings that benzene poses "minimal" risks below the level of the existing standard, or that a "record basis" exists by which the Secretary could perform the quantification of benefits required by the court's construction of the Act. Such findings were not even made, let alone relied upon, by the court below.[3]

[3] The Court expressly upheld the Secretary's determination that low levels of exposure to benzene pose a leukemia risk, and held only that the Secretary had not been able to adduce substantial evidence as to "the extent of" that risk. App. 18a-19a. While the court noted that a risk at levels of exposure approximating the PEL could not be documented by "empirical evidence", but rather had been inferred from studies involving higher levels of exposure (*id.*), the same was true in each of the prior cases which API strives to distinguish: *American Iron and Steel Institute ("AISI")* v. *OSHA*, 577 F.2d 825, 831-832 (3d Cir. 1978), *petitions for cert. pending*, Nos. 78-918, 78-919; *Society of the Plastics Industry* v. *OSHA*, 509 F.2d 1301, 1308 (2d Cir.), *cert. denied*, 421 U.S. 992 (1975); *Industrial Union Department* v. *Hodgson*, 499 F.2d 467, 475, 479 and n. 27 (D.C. Cir. 1974).

Nor did the court below hold that a "record basis" exists by which the Secretary could carry out the benefit quantification required by its decision. To the contrary, the court recognized that the Secretary "will be able" to make the estimates required by its ruling only when certain scientific studies, which have proved unsuccessful to date, become "sufficient." App. 20a-21a.

Consequently, API's lengthy recitation of the "evidence" which it claims would have supported such findings is entirely beside the point. But because API's rewriting of the record could mislead if left unanswered, we note the most obvious errors in the margin.[4]

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[4] A. API's assertion that this case involves "minimal" health risks is based on a series of gross distortions of the record, including the following:

i. The epidemiological studies in the record do not, as API maintains, show that there has been "no unexpected incidence of leukemia among workers exposed for many years to low concentrations of benzene" (API Opp. 11), nor do they demonstrate that "no workers are dying of benzene-leukemia." (API Opp. 6). One of the primary reasons, among many, for the Secretary's rejection of API's reliance on those studies was that only a small percentage of the workers included in the studies had actually been exposed to benzene, and the studies made no attempt to ascertain the health status of those particular workers. App. 124a, 182a.

ii. The studies of Drs. Aksoy, Vigliani and Infante did not show that increased incidence of leukemia was eliminated "once benzene exposures were reduced below 100 ppm." (API Opp. 10-11). To the contrary, as the court below noted (App. 8a, n. 13), Drs. Aksoy and Vigliani reported that increased incidence of leukemia vanished once benzene exposures had been *elimina.ed,* not "reduced below 100 ppm." Ex. 60 at 3, Ex. 2-15 at 125. API also misinterpreted the Infante data on this point, as Dr. Infante testified. Tr. 1079-1080.

iii. Particularly misleading is API's effort to characterize the existing PEL of 10 ppm as a level "endorsed" by most scientists, and rejected by the Secretary due to a misreading of the Infante Report. (API Opp. 7-8 and nn. 16, 19). The fact is that in August, 1976—before the Infante Report had been issued—the National Institute for Occupational Safety and Health ("NIOSH") recommended a PEL of 1 ppm and called for the issuance of an emergency temporary standard establishing that limit. Ex. 2-5. The NIOSH recommendation was based, as the court below recognized, on "several additional studies," including those of Aksoy and Vigliani, which had been issued subsequent to NIOSH's original 1971 report on benzene. App. 8a and n. 13. Compare Ex. 2-5 to Ex. 2-3. Moreover, at the benzene hearing virtually every independent public health expert who testified agreed that there is no safe

II

As is plain to all except the signatories of the API memorandum in opposition, the holding of the court below —that in *no* case may the Secretary promulgate a standard until information becomes available by which to quantify

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level of exposure to benzene, and that exposures should therefore be reduced to the lowest feasible level. See, e.g., Tr. 148-149 (Aksoy), 328 (Sakol), 351-352 (Goldstein), 895 (Infante), 1229 (Liago). As the cited testimony indicates, nothing could be further from the truth than API's attempt to leave the Court with the impression that the authors of the Infante Report regarded a PEL of 1 ppm as unjustified (API Opp. 10). To the contrary, they strongly advocated the 1 ppm PEL.

B. API's efforts to show that the Secretary could have quantified the benefits of the benzene standard as required by the court below are likewise based on a distortion of the record.

i. Contrary to API's assertion (API Opp. 12), OSHA's economic contractor did *not* testify that he could have estimated the benefits of the standard. The contractor testified only that his staff is "qualified to undertake cost effectiveness analysis" (Tr. 512), not that the data exists by which to perform such an analysis with respect to benzene. In point of fact, as the Secretary concluded, the data does not exist. App. 160a. Indeed, the economic contractor upon whom API places such reliance agreed with that conclusion, stating that because of uncertainty as to the dose-response relationship for benzene "it is not possible to quantify incremental health benefits beyond predicting decreased benzene poisoning and a reduced leukemogenic potential from occupational benzene exposures." Ex. 5, p. 3-5. As Dr. Goldwater, a witness for the Manufacturing Chemists Association, stated when he was asked whether it would be practical to estimate the risk created by exposures between 1 ppm and 10 ppm: "Obviously, this is not the sort of thing that one is able to do." (Tr. 2506-2507).

ii. The lack of necessary data is highlighted by the "admittedly preliminary" risk assessment prepared by Dr. Wilson, upon which API places heavy reliance. (API Opp. 13). As the Secretary stated in rejecting the Wilson hypothesis, Dr. Wilson simply "assumed" (App. 161a) the data which, as the court below recognized, is the most critical element of any potential risk assessment: i.e., the dose-response curve. Far from employing "worst-case methodology"

the benefits of the standard and to compare the benefits with the costs (App. 17a-21a)—creates a conflict in the circuits with respect to a crucial issue of law.[5]

Three courts of appeals have held to the contrary, affirming the Secretary's policy of setting the lowest feasible exposure limit for a carcinogen despite an absence of proof as to the extent of the harm caused by low levels of exposure. See HUD Pet. 13-15, discussing *AISI*, *supra*; *Society of Plastics*, *supra*; *Industrial Union Department*, *supra*. In addition, while the court below held that the Secretary must weigh the benefits of a standard against the costs, the prior cases have held that the role "economic considerations are

(API Opp. 13), in making his dose-response assumptions Wilson chose to assume that the Infante data—found by OSHA to be the most reliable—had greatly overstated the risk. Ex. 149B at 19-20, Tr. 2737-2738, 2772-2773. As a result of this and other biases (e.g., Tr. 2742), the Wilson assessment was meaningless. Dr. Wilson's failure to provide the Secretary with the support for his assessment (see Sec. Pet. 15, n. 9) further indicates the utter unreliability of the Wilson projections.

iii. API's assertion that in prior cases there has been greater evidence of the benefits of a low PEL than exists in this case (API Opp. 20-22) is erroneous. In no OSHA case has there been evidence of the effects of a carcinogen at low levels of exposure. What there has been—in this case as well as the others—is evidence of a substantial number of deaths at high exposures. See HUD Pet. 8.

[5] The conflict is recognized not only by the Secretary and HUD, but also by both AISI and Republic Steel Corporation, who were successful petitioners below and unsuccessful petitioners in *AISI* v. *OSHA*, *supra*. See Memorandum Of The American Iron And Steel Institute In Support Of Petitions For A Writ Of Certiorari, and the Response Of Republic Steel Corporation to the petitions, both filed in this case on January 26, 1979.

The circuit conflict was certainly apparent to the parties who recently filed simultaneous petitions for review of the OSHA lead standard in the Third and Fifth Circuits. See HUD Pet. 16. In motion papers filed in those proceedings the Lead Industry Association, which had filed in the Fifth Circuit, has explicitly acknowledged that the courthouse race regarding the lead standard was prompted by the circuit conflict created by the instant decision.

to play in review of the Secretary's standard" is limited to the requirement that a standard must be economically "feasible." *AISI*, *supra*, 577 F.2d at 835-836. See also *Industrial Union Department*, *supra*, 499 F.2d at 478-481;[8] *Society of Plastics*, *supra*, 509 F.2d at 1309.

API attempts to escape the force of this manifest conflict by maintaining that in the prior cases industry's only claim was that a safe level of exposure existed at a point higher than the PEL. That is simply incorrect. For example, in *Society of Plastics*, *supra*, industry argued broadly that the record did not "justify such a low standard", 509 F.2d at 1308, and objected to the costs such a standard would entail, *id.* at 1309. And in *AISI*, industry argued that even if no safe level of exposure exists, the Secretary is obligated to produce evidence that "the specific level" which he adopts as a PEL "is justified on the basis of health need."[7] In a separate brief, Republic Steel Corporation argued that in setting a PEL the Secretary must ascertain "the true risks" of exposures above the PEL, and that "whatever the true risks might be, they must be compared to the benefits. . . ."[8] Republic also challenged the costs of the standard as excessive, and argued that the Secretary should have weighed "the necessity and efficiency of the individual standard."[9] In *Industrial Union*

[8] In *Industrial Union Department* the Secretary had delayed the effective date of the asbestos standard on the basis of a prediction that "no harm is reasonably expected to result from exposures during the transitional period." 499 F.2d at 479, n. 28. The court of appeals, while stating that the Secretary's prediction was not erroneous, noted that the delay nevertheless exposed employees to "some additional risk of disease", and held that the Secretary should have required that all feasible steps be taken to eliminate even that minimal risk. 499 F.2d at 479.

[7] Brief For All Petitioners Other Than Republic Steel Corporation And C F & I Steel Corporation, *AISI* v. *OSHA*, 3d Cir. Nos. 76-2358, et al. (filed May 9, 1977), at 17.

[8] Brief For Petitioner Republic Steel Corporation, *AISI* v. *OSHA*, 3d. Cir. Nos. 76-2358, et al. (filed May 9, 1977), at 38.

[9] *Id.* at 63.

Department, supra, the question of how the benefits of a standard should be weighed in comparison to the costs was also clearly raised and decided. See 499 F.2d at 477-478, 479 and nn. 27, 28.

It is therefore beyond dispute that the construction of the Act articulated in *AISI, Society of Plastics,* and *Industrial Union Department* was carefully considered by the three circuits which decided those cases, and that the decisions cannot be reconciled with the decision of the court below.

CONCLUSION

For the reasons stated in this brief and in the IUD Petition for Certiorari, the petition for certiorari in No. 78-911 should be granted.

Respectfully submitted,

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